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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 171

JAMES J. DONOHUE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The Argument contained in the Brief for the United States which has been filed in opposition to the Petitioner's Application for Writ of Certiorari compels a reply thereto as authorized by Rule 24 (4) of the Revised Rules of the Supreme Court of the United States.

On Page 9 of the brief, the Government's counsel argues:

> "Petitioner does not in this Court attack the finding that his conduct constituted contempt, and rightly so. His disorderly conduct in striking 'the bench'

> while shouting his reply to the referee constituted misbehavior which interfered with the orderly administration of justice."

Petitioner most certainly does attack such finding. Argument has been made, as fairly comprised in the record, that there was absolutely no evidence introduced at the contempt hearing which supports the contention that there were any acts committed which could be termed "disorderly". That there was no evidence introduced at the contempt hearing of any bench striking. That there is no evidence in the record of any "shouting". That there is no evidence in the record *from which to infer that there was any interference with the orderly administration of justice.*

On Page 11 therein, counsel for the Government state:

> *"It is true the record does not reflect that the official transcript of the proceedings before the referee was formerly offered into evidence."* (And it wasn't!) "However, the record also fails to show any objection in the District Court to this informal procedure." (emphasis supplied)

Actually such "official transcript" was only a part of the certificate of the referee—nothing more than a pleading. See in re *Matter of McIntosh*, 73 F. (2d) 908. It (transcript) was not stipulated to as to accuracy and the shorthand reporter's comments therein were not admissible into evidence in such manner as a violation of the "best evidence" rule and since it deprived defendant of his right to cross examine! It would seem unique for the Court to hold in any trial, *under any circumstances,* that it is the defendant's burden to proceed and introduce evidence and raise objections *before the prosecution*

has made any offer of proof whatsoever. If the counsel for the prosecution fumbles the ball, and fails to carry the required burden of proof, does our system of jurisprudence require defense counsel to fill in his case for him? Simply stated, is a man innocent until proved guilty or is he guilty until proved innocent?

Counsel cites *Piemonte vs. United States*, 367 U.S. 556, and states:

> "There is no reason to assume a more cumbersome procedure is necessary here."

The *Piemonte case*, of course, involved a situation wherein the Petitioner flatly refused to answer questions before a Grand Jury and the Trial Judge *asked the Petitioner several times if he persisted in refusing to answer the questions.* (To which Piemonte, the Petitioner, replied in the affirmative.) In our case, the Petitioner was convicted without being confronted by any witnesses and without any evidence being introduced into the record against him. He was not even asked what his plea was! In *Cook vs. United States*, 267 U.S. 517, 529, the Court stated:

> "Petitioner was convicted without being confronted by any witnesses or evidence against him, and there is no evidence of guilt in the record to sustain the conviction."

In considering the *Piemonte case* attention is called to the words of Chief Justice Warren in his dissenting opinion at page 564:

> "Even if the Court is unwilling to recognize that the Constitution prohibits the imposition of punishment in a summary proceeding, it ought to exercise its supervisory power over the lower Federal Courts

to rectify the abuse of the summary contempt power which the record in this case makes manifest.

See *Offutt vs. United States*,
348 U.S. 11."

In the *Offutt case* the Court intimates that a "rare flareup", a "show of evanescent irritation — a modicum of quick temper * * * *must be allowed even Judges.*" (emphasis supplied)

At page 13 of the Brief in Opposition, counsel admits and states that in a Section 21(a) examination:

"If the witness is also a creditor, *the law is cloudy as to the extent of participation permitted to the creditor's attorney* * * * if Petitioner's attorney thought the referee's ruling as to his participation too narrow, he could have sought a ruling from the District Court." (emphasis supplied)

It is respectfully submitted that *there is absolutely no reason why the law should be permitted to remain cloudy* on this or any other point! Further, under such circumstance, how would one seek a ruling from the District Court and what opportunity was there to do so? It is respectfully submitted that it is entirely proper to seek such ruling from this Honorable Court whose historical function it has been to obliterate such offending clouds and create a clear range of vision for our successors.

Further, on page 13 of their Brief in Opposition, it is stated:

"Petitioner does not point to any particular line of questioning which he considers objectionable."

Then again on page 13:

"In so far as the examination also touched Petitioner's claim as a creditor, this was inevitable because

> the assets and liabilities of the Bankrupt are the liabilities and assets of his debtors and creditors."

Attention is called to pages 8, 9, 10, 11 and 12 of the Petitioner's Brief on Appeal which is in the record as certified by the Clerk of the Court of Appeals for the Seventh Circuit. Surely Petitioner has pointed to particular lines of questioning which he considers objectionable *and rightly so!* Further, it is respectfully asserted that if the examination must "inevitably" touch on the witness's claim as a creditor, then the law should, as a matter of right, permit *such creditor-witness* to have his attorney who is present with him participate fully to make seasonable objection to errors and irregularities. Otherwise, under Section 32(c)(2) of the Bankruptcy Act as referred to in the original Petition, such errors and irregularities are *waived!*

On page 14 of the Government's Brief we find fair warning of the injustice which then has opportunity to result as it did here. Without citing any authority, counsel states:

> "But by testifying *without objecting* to the nonpayment of witness fees, *Petitioner waived any irregularity* in this respect." (emphasis supplied)[1].

Finally, in the Brief submitted in opposition to the request of the Petitioner, it is pointed out that questions are raised which are not *fully* argued in the Petition.

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[1] Attention is invited to the significance to be attached to the wording in Section 41(a) of the Bankruptcy Act, 11 U.S.C. 69.:

> "A person shall not, in proceedings before a referee, * * *, having taken the oath, refuse to be examined according to law: *Provided*, That a person * * * shall not be required to attend *as a witness* * * * unless his lawful mileage and fee for one day's attendance *shall* be first paid or tendered to him." Note word "*Provided*" which is *emphasized* in the rule. (Other emphasis supplied).

This is not very helpful to a determination of whether or not the Writ should issue. The questions to be answered remain before us. The Petition for a Writ of Certiorari *should be* granted in this instance. Then ample argument can and will be presented on the merits of the Petitioner's cause if the Court permits. Justice must not miscarry and the high standards of our established legal philosophy must be met.

Wherefore, your Petitioner humbly and in all sincerity prays that this Honorable Court will grant to him the relief he seeks.

Respectfully submitted,

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Dated: July 25, 1962.